A

MARCEL JUDE MS JOSEPH

v.

MESSRS JAYASURIYA KAH & CO

B HIGH COURT SABAH & SARAWAK, KOTA KINABALU
LEE HENG CHEONG JC
[CIVIL CASE NO: KK 22-39-2011]
1 OCTOBER 2012

C ***TORT:*** *Negligence - Economic loss - Defendant legal firm undertook conduct of legal matters of plaintiff's former client - Plaintiff claimed defendant negligent in taking over conduct of client's legal affairs without first having plaintiff discharged as client's advocate and solicitor and settling outstanding fees due from client - Whether defendant owed plaintiff*
D *duty of care - Whether defendant breached duty of care - Whether defendant was cause of loss suffered by plaintiff - Whether defendant liable to pay damages to plaintiff*

EVIDENCE: *Conduct - Estoppel - Whether plaintiff had by his conduct*
E *represented that he had no objections to defendant acting for client - Whether plaintiff estopped from denying that he had consented to defendant taking over conduct of client's legal affairs*

LEGAL PROFESSION: *Practice and Etiquette - Breach of rule - Whether breach of rule attracted liability - Advocate (Practice and*
F *Etiquette) Rules 1988, r. 54*

The plaintiff, an advocate and solicitor, was engaged by one Cheok Brothers Sdn Bhd ('CBSB') to undertake all work in connection with a claim against the Forestry Department and the
G Government of Sabah ('the 2002 suit'). On 14 January 2008, a consent order was recorded in respect of the civil suit, where it was provided that CBSB should pay the plaintiff's legal costs within seven days from 14 January 2008. Subsequently, CBSB appointed the defendant, a legal firm, to act for it. The plaintiff
H was willing to arrange for the transfer of all files in his possession to the defendant after CBSB had settled his professional fees in the sum of RM700,000. The defendant issued a letter dated 18 February 2009 to the plaintiff to inform the latter that it was acting on behalf of CBSB. This letter was copied to the director
I of the Forestry Department and the State Attorney-General's Department. The plaintiff claimed that the defendant by issuing the letter dated 18 February 2009 had taken over the 2002 suit

without the plaintiff being discharged as the solicitors for CBCB in the 2002 suit. Consequently, the plaintiff commenced an action in negligence against the defendant wherein it claimed general and special damages by reason of the defendant's conduct in having undertaken the conduct of the 2002 suit without first having the plaintiff discharged as an advocate and solicitor of CBSB and without ensuring that the outstanding fees due from CBSB to the plaintiff had been paid. The plaintiff also contended that the defendant had contravened r. 54 of the Advocate (Practice and Etiquette) Rules 1988 ('the Rules') and O. 64 r. 1 of the Rules of the High Court 1980 ('RHC 1980').

Held (dismissing claim and counterclaim with costs):

(1) The plaintiff's claim against the defendant, which was for the recovery of the professional fees due to him from CBSB, was a claim for pure economic loss. This claim did not fall into any recognised category of liability. However, even if the defendant had owed and breached a duty of care to the plaintiff, the defendant was not the cause of or had materially contributed to the losses and damages suffered by the plaintiff. (paras 19-22)

(2) Further, the plaintiff had by his acts or omissions or conduct represented that he did not have any objections to the defendant acting for CBSB in the 2002 suit and had in fact or in law consented to the same. Thus, the plaintiff was estopped from denying that he had consented to the same. There was no duty of care owed by the defendant to the plaintiff to secure the professional fees due to the plaintiff from CBSB. (paras 23-27)

(3) Even if the defendant had breached r. 54 of the Rules, such breach would have only rendered the defendant liable to disciplinary proceedings under the inquiry committee, as r. 54 is only a rule of conduct and not a rule of law. (para 37)

(4) Order 64 of the RHC 1980 was merely a procedural provision to regulate the manner of filing the notice of change of solicitors and a breach of this order did not attract any liability for its non-compliance. (para 38)

(5) Having perused the letter dated 18 February 2009, other relevant documents and the testimonies of the various witnesses, it was clear the defendant was not purporting to

act for CBSB in the 2002 suit. Further, the plaintiff in his letter in reply had neither made any mention of the defendant taking over the 2002 suit nor raised any objections to such a takeover. (paras 44-46)

(6) The defendant had not adduced any credible evidence to prove its counterclaim. (para 49)

Case(s) referred to:

Asia Commercial Finance (M) Berhad v. Bank Bumiputera Malaysia Berhad & Ors [1987] 1 LNS 70 HC ***(refd)***

BHR Group Ltd (UK) v. Witech Sdn Bhd & Ors [2004] 3 CLJ 362 HC ***(refd)***

Boustead Trading (1985) Sdn Bhd v. Arab-Malaysian Merchant Bank Berhad [1995] 4 CLJ 283 FC ***(refd)***

Caporo Industries Plc v. Dickman [1990] 2 AC 605 ***(refd)***

Latchman Singh & Sons v. Tan Kian [1991] 1 CLJ 128; [1991] 3 CLJ (Rep) 121 HC ***(refd)***

Majlis Perbandaran Ampang Jaya v. Steven Phoa Cheng Heng Loon & Ors [2006] 2 CLJ 1 FC ***(refd)***

PL Construction Sdn Bhd v. Abdullah Said [1988] 2 CLJ 808 HC ***(refd)***

Sri Minal Construction Sdn Bhd v. Mobil Oil Malaysia Sdn Bhd [2005] 4 CLJ 767 CA ***(refd)***

Legislation referred to:

Advocates (Practice And Etiquette) Rules 1988, r. 54

Advocates Ordinance (Sabah Cap. 2), s. 17

Legal Profession (Practice and Etiquette) Rules 1978, r. 56

Rules of the High Court 1980, O. 64 r. 1

For the plaintiff - Marcel Jude; M/s Marcel Jude Joseph & Co

For the defendant - Govinda Raj; M/s Raj & Co

Reported by Vani Krishnan

JUDGMENT

Lee Heng Cheong JC:

Introduction

[1] The plaintiff and the defendant are law firms operating in Kota Kinabalu, Sabah. The plaintiff's cause of action against the defendant as disclosed in his pleadings in this action is in negligence. In his endorsement of claim dated 17 February 2011, the plaintiff's claim against the defendant was for "general and

special damages arising from the negligence of the defendant in acting for one Chok Brothers Sdn Bhd without the plaintiff being discharged as the solicitors for the said Chok Brothers Sdn Bhd" in Suit No. K22-187 of 2002;

[2] At para. 10 of the statement of claim the plaintiff contended that the defendant had taken over the conduct of Suit No. K22-187 of 2002, by issuing a letter dated 18 February 2009 to the plaintiff and copied to the Forestry Department, the State Attorney-General's Chambers and Chok Brothers Sdn Bhd in non-compliance with r. 54 of the Advocates (Practice And Etiquette) Rules 1988 and O. 64 r. 1, RHC 1980;

[3] At para. 13 of the statement of claim dated 16 August 2011, the plaintiff further contended that he had suffered loss and damage by reason of the following negligent acts of the defendant that is to say that the defendant had undertaken the conduct of Suit No. K22-187 of 2002:

(a) Without first having the plaintiff discharged as an advocate and solicitor of the said Chok Brothers Sdn Bhd;

(b) Without first having the plaintiff secured in respect of his outstanding fees due from Chok Brothers Sdn Bhd to the plaintiff; and,

(c) Without first obtaining the consent of the plaintiff.

[4] Paragraph 2 of the plaintiff's reply dated 19 September 2011 stated as follows:

> ... This cause of action is based on the negligence of the Defendant in taking over the conduct of the suit namely K22-187 of 2002 ("the Matter") without first ensuring that the Plaintiff was paid his legal fees by the Company (ie. Chok Brothers Sdn Bhd) and as a result of the breach of such duty of care, the Plaintiff has suffered loss and damage ...

[5] From the pleadings and the evidence adduced, I find that the plaintiff's main contention is grounded on the issuance of the defendant's letter dated 18 February 2009 (refer to pp. 6 - 7 of Bundle ABD (A & C) and the pleadings also disclosed that the plaintiff's cause of action against the defendant is solely related to Suit No. K22-187 of 2002.

Agreed Facts For Trial Marked As 'AF';

[6] The plaintiff at the material time was an advocate and solicitor having a place of business previously at 10-2, Lot 108, 2nd Floor, Block D (Opp Giant Superstore), Lorong Plaza Kingfisher 6, Plaza Kingfisher, 88450, Kota Kinabalu, Sabah.

[7] The plaintiff was engaged by one Chok Brothers Sdn Bhd ("CBSB") Since the year 2002 to undertake all work in connection with a claim against the Forestry Department and the State of Government of Sabah together with court litigation, namely, Civil Suit No. K22-187 of 2002 in the High Court at Kota Kinabalu in Sabah (hereinafter referred to as "the matter").

[8] The defendant is a legal firm having a place of business at Suite 208, 2nd Floor, Wisma Sabah, 88000, Kota Kinabalu, Sabah.

[9] On 14 January 2008 in the High Court at Kota Kinabalu, the said Chok Brothers Sdn Bhd, through its solicitors, the plaintiff, entered into a consent order with the Forestry Department and the State Government of Sabah in Civil Suit No. K22-187 of 2002. The consent order included item (f) of which provided that the said Chok Brothers Sdn Bhd shall pay legal costs of the plaintiff within seven days from 14 January 2008.

[10] On 5 June 2008, by way of a letter, one, Chok Chee Shung a director of Chok Brothers Sdn Bhd requested to transfer the probate matter of the late father of Mr Chok Chee Shung to the defendant. This letter was copied to the defendant.

[11] On 12 June 2008, the plaintiff replied to Chok Chee Shung to inform him to pay the sum of RM700,000 to arrange for the transfer of files to the defendant. The said letter was copied and delivered to the defendant.

[12] Acting on behalf of Chok Brothers Sdn Bhd in Suit No. K21-20 of 2008, the defendant issued a letter to the plaintiff and copied to the Forestry Department, the State Attorney General Chambers and Chok Brothers.

[13] By a letter dated 24 February 2009, the plaintiff replied the defendant's letter dated 18 February 2009 to *inter alia*, propose a settlement of his legal fees.

Agreed Issues For Trial Is Marked As 'AI';

[14] Does the defendant owe a duty of care arising under the laws ofnegligence and/or r. 54 of the Advocates (Practice and Etiquette) Rules 1988 and/or O. 64 r. 1 of the Rules of the High court in regard to the collection of the legal fees of the plaintiff amounting to RM506,000?

[15] Did the defendant breach the duty of care and/or r. 54 of the Advocate (Practice and Etiquette) Rules 1988 and/or O. 64 r. 1 of the Rules of the High Court?

[16] If the answer to Question No. 2 is yes, whether the defendant is liable to pay general damages and special damages in the sum of RM506,000 to the plaintiff or at all.

Consideration Of The Agreed Issues For Trial

Does The Defendant Owe A Duty Of Care Arising Under The Laws Of Negligence And/Or Rule 54 Of The Advocates (Practice And Etiquette) Rules 1988 And/Or Order 64 Rules 1 Of The Rules Of The High Court In Regard To The Collection Of The Legal Fees Of The Plaintiff Amounting To RM506,000?

[17] As regards the issue as to whether the defendant owed a duty of care arising under the laws of negligence in the collection of the legal fees of the plaintiff amounting to RM506,000, the plaintiff contended that:

(i) The defendant owed him a duty of care, not to act for CBSB without the plaintiff being discharged as solicitors for CBSB, not to act for CBSB without securing the professional fees due from CBSB to the plaintiff and not to act for CBSB without obtaining the consent of the plaintiff (refer to para. 13 of the statement of claim).

(ii) The defendant had breached its duty of care;

(iii) By reason of the defendant's breach of its duty of care to the plaintiff, the plaintiff had suffered loss and damage;

(iv) The loss and damage caused to the plaintiff by the defendant was foreseeable.

[18] The plaintiff's claim in this action, is not based on any damage to person or property but the loss is a purely financial or "pure economic loss" in tort. In the Federal Court case of *Majlis Perbandaran Ampang Jaya v. Steven Phoa Cheng Heng Loon & Ors* [2006] 2 CLJ 1, Steve Shim CJ held:

> The third question postulated the consideration of whether pure economic loss is recoverable under the Malaysian jurisprudence in negligence and nuisance. In the law of negligence, there is no immutable rule that pure economic loss is not recoverable. All major Commonwealth jurisdictions recognize that **pure economic loss is recoverable in negligence**. Under English law, the general duty of care test enunciated in *Caparo Industries Plc v. Dickman* [1990] 2 AC 605 is applicable to all negligence claims, including claims for pure economic loss. Pursuant to this test, *3 questions have to be addressed, namely, whether the damage suffered by the plaintiff is reasonably foreseeable; whether there is a relationship of proximity between the plaintiff and defendant; and whether it is fair and reasonable that the defendant should owe the plaintiff a duty of care*. The English courts have adopted a dual approach in applying the Caparo test (see *Marc Rich & Co. AG v. Bishop Marine Co Ltd* [1996] 1 AC 211). The first concerns the "categorization approach". Here, the English courts would determine if the plaintiff's claim falls into a **recognised category of liability**. In cases of pure economic loss, the recognized categories include the following scenarios ie, (1) where a defendant has assumed a particular responsibility towards the plaintiff. For example, in *White v. Jones* [1995] 2 AC 207, where a solicitor was found to have assumed a responsibility towards the beneficiary under a will when drafting the will pursuant to a testator's instructions; (2) where a defendant has exposed a plaintiff to a particular danger (see *Harris v. Evans* [1998] 1 WLR 1285) and (3) where there is a recognized legal relationship between the plaintiff and defendant. For example, in *Phelps v. Hillingdon London Borough Council* [2001] 2 AC 6019, 667, it was found that a teacher-pupil relationship might place a teacher under a duty of care not to cause pure economic loss by teaching pupils the wrong syllabus. **The second concerns the "open-ended approach"**. Here, if the facts of a particular case do not come within a recognized category of liability, a court could go further to look at the facts closely to determine if a duty of care should nevertheless be owed by the defendant to the plaintiff. Recent statements by the English courts confirm that the "open-ended approach" can be used to recognize duties of care in new situations: (see *Spring v. Guardian Assurance Plc* [1985] 2 AC 295.) (emphasis added)

[19] I also find that the plaintiff's claim herein against the defendant for pure economic loss does not fall into a recognised category of liability as laid down in the said case of *Caparo Industries Plc v. Dickman (supra)*. The question before me now, is whether the plaintiff could come within the "open-ended approach" to determine if a duty of care should nevertheless be owed by the defendant to the plaintiff. Steve Shim CJ in the *MPAJ v. Steven Phoa's* case *(supra)* held as follows:

> [13] Having had the benefit of reading the various authorities on this subject, I am more inclined to accept the positions taken by the courts in Australia and Singapore. In adopting the sentiments and observations expressed by the Singapore Court of Appeal in *PT Bumi International Tankers (supra)* I would also endorse the view that caution should be exercised in **extending the principle in *Donoghue v. Stevenson* to new situations**. Much would depend on the facts and circumstances of each case in determining the existence or otherwise of a duty of care.
>
> [14] The Court of Appeal in the instant case is correct in adopting the view expressed by Lord Oliver in *Murphy v. Brentwood (supra)* that the critical question is not the nature of the damage itself, whether physical or pecuniary, but whether the scope of the duty of care in the circumstances of the case is such as to embrace damage of the kind which the plaintiff claims to have sustained. *The decision in Murphy involves, as I have mentioned earlier, the application of the Caparo test which takes into account the elements of foreseeability, proximity and the additional requirement of justice, fairness and reasonableness*. (emphasis added)

[20] Taking into consideration the facts and circumstances of the present case, I find that there is no compelling reason to extend the scope of the duty of care after taking into consideration the elements of foreseeability, proximity and the additional requirements of justice, fairness and reasonableness as laid down in the House of Lords' decision of *Caporo Industries Plc v. Dickman* [1990] 2 AC 605.

[21] I agree with the contention of the defendant even if I were to extend the duty of care owed by the defendant to the plaintiff and find that the defendant had in fact breached that duty of care, the plaintiff is still not able to prove that his losses and

damages were caused or materially contributed by the defendant. In *MPAJ v. Steven Phoa (supra)*, Steve Shim CJ addressed the issue of causation as follows:

> Causation is a matter to be determined by common sense and what the law regards as fair, just and reasonable in the circumstances of a particular case ... The relevant question is whether the acts and/or omissions of a particular defendant made a material contribution to the harm suffered by the plaintiff ...

[22] I find that the loss and damage of the plaintiff arose as a result of the various decisions of the Court in Suit No. K22-187 of 2002, Suit K20-21 of 2008 and Suit K22-77 of 2008 whereby the plaintiff was unsuccessful in levying execution against CBSB, to recover his professional fees which is the subject matter of the present case. Thus I find that even if the defendant owed and breached a duty of care to the plaintiff, the defendant was not the cause of or had materially contributed to the loss and damage to the plaintiff.

[23] Further I find that the plaintiff, by his acts or omissions or conduct, had represented that he did not have any objections to the defendant acting for CBSB in Suit No. K22-187 of 2002 and had in fact or in law consented to the same. In the premises I find that the plaintiff was estopped from denying that he had consented to the same.

[24] The plaintiff had by his letter dated 24 February 2009 and/or by virtue of his conduct in serving the summons in chambers dated 13 April 2009 in Suit No. K22-187 of 2002 and/or by undertaking negotiations with CBSB through the defendant which led to the deed of settlement dated 2 June 2009, was clearly estopped from denying that he had acquiesced and/or had consented to the defendant acting for CBSB in Suit No. K22-187 of 2002. I noted that at no time whatsoever had the plaintiff raised the issue of r. 54 of the Advocates (Practice and Etiquette) Rules 1988 until 15 January 2010 and neither had he raised any objections or protests in this regard.

[25] In the Federal Court case of *Boustead Trading (1985) Sdn Bhd v. Arab-Malaysian Merchant Bank Berhad* [1995] 4 CLJ 283, Gopal Sri Ram JCA reiterated the principles of promissory estoppel in the following terms: A

> The width of the doctrine has been summed up by Lord Denning in the Amalgamated Investment case (at page 122) as follows: B
>
> ...
>
> When the parties to a transaction proceed on the basis of an underlying assumption either of fact or of law - whether due to misrepresentation or mistake makes no difference - on which they have conducted the dealings between them - neither of them will be allowed to go back on that assumption when it would be unfair or unjust to allow him to do so. If one of them does seek to go back on it, the Courts will give the other such remedy as the equity of the case demands. C D
>
> ...
>
> The estoppel here relied upon is known as an equitable estoppel, or *estoppel in pais*. The law upon the subject is well settled. The vital principle is, that he who, by his language or conduct, leads another to do what he would not otherwise have done, shall not subject such person to loss or injury by disappointing the expectations upon which he acted. Such a change of position is sternly forbidden. It involves fraud and falsehood, and the law abhors both. E F
>
> This remedy is always so applied as to promote the ends of justice.
>
> *Thus far we have dealt with the operation of the doctrine in the context of there having been offered some active encouragement by the party sought to be estopped. But we do not apprehend the law to be different when the encouragement comes in the form of silence.* (emphasis added) G

[26] I noted that throughout the entire episode with regard to Suit No. K22-187 of 2002, I find that the plaintiff had by his letters and/or by his actions and/or omissions and/or failure to object, represented to the defendant that he had agreed and consented to the defendant acting for CBSB in Suit No. K22-187 of 2002, thus the plaintiff is now estopped from denying otherwise. H I

[27] In the premises, I find that there is no duty of care owed by the defendant to the plaintiff to secure the professional fees due to the plaintiff from CBSB.

Did The Defendant Breach The Duty Of Care And/Or Rule 54 Of The Advocate (Practice And Etiquette) Rules 1988 And/Or Order 64 Rule 1 Of The Rules Of The High Court?

[28] The plaintiff contended that the defendant had contravened r. 54 of the Advocates (Practice and Etiquette) Rules 1988 based on the defendant's letter dated 18 February 2009 which the plaintiff contended, was proof that the defendant had taken over the conduct of Suit No. K22-187 of 2002, in place of the plaintiff.

[29] Rule 54 of the Advocates (Practice and Etiquette) Rules 1988 reads as follows:

> 54. Where in any matter or proceeding, the name of any advocate or the name of his firm appears on the records for any party, or an advocate is known to be acting for a party, in a matter whether in a court or not, no other advocate shall knowingly agree to appear or to act or continue to appear or to act for such party in such matter or proceeding unless:
>
> (a) he obtains the consent of the first-named advocate; or
>
> (b) he is satisfied that the proper professional remuneration of the first-named advocate has been paid or he undertakes that the same will be paid; or
>
> (c) he has, in ignorance that such name so appears on the record or that such advocate has been so acting, already agreed to appear or to act for such party and is unable by reason of circumstances or urgency or the like to refuse to appear or to act further for such party, without exposing himself to a charge of breach of professional duty; or
>
> (d) the first-named advocate is unwilling, or has refused to act further for such party, in which event he shall, if so required, protect any lien which the first-named advocate may have for costs.

[30] At this stage, it would be pertinent to refer to that part of the Ruling of the learned Judicial Commissioner, Tuan Stephen Chung Hian Guan (as he then was) in Civil Suit No. K22-27 of 2010 which is the earlier suit taken out by the plaintiff against the

defendant and based on the same facts as in the present action. In that suit, the plaintiff also contended that the defendant had contravened r. 54 and O. 64 r. 1, RHC 1980. The said learned Judicial Commissioner struck out the plaintiff's writ and amended statement of claim and had dealt with the plaintiff's contentions in his ruling (which is exhibited at pp. 114 - 21 of ABD (A & C)) as follows:

> 4. From the Amended Statement of Claim, the Plaintiff's action against the Defendant is based on Rule 54 of the Advocates (Procedure And Etiquette) Rules 1988 and on Order 64 of the Rules of the High Court. Rule 54 provides that an advocate shall not appear for a party represented by another advocate. Assuming that the Defendant had breached Rule 54 of the Advocates (Practice & Etiquette) Rules 1988, it does not give rise to any cause of action by the Plaintiff against the Defendant which will result in damages being payable. The Plaintiff's complaint only goes to the etiquette and the professional conduct of the Defendant as Solicitors which may result in disciplinary action being taken against the Defendant as solicitors.
>
> 5. The complaint is within the purview of the Inquiry Committee under Rule 4(1)(a) of the Advocates (Inquiry Committee) Rules 1988. Rule 4(1)(a) provided that the duties and functions of the Inquiry Committee shall be to consider examine, scrutinize or enquire into any complaint made against any advocate in his professional capacity by any person aggrieved by any action of the advocate. Rule 4(1)(c) provides that if upon examination and inquiry into such complaint, the Inquiry Committee finds that the complaint is bona fide, to commence proceedings to apply for such order as the Inquiry Committee thinks fit under section 13 of the Ordinance.
>
> 6. Section 13 provides for the procedure to suspend, fine, censure or strike an advocate off the role of advocates which shall be by way of an application to a Judge in Chambers for a rule to issue to the advocate to show cause why he should not be suspended, fined, censured or be struck off the roll as the case may be.
>
> 7. Order 64 RHC concerns the giving of notice of any change of solicitor. O. 64 r .1 of the RHC also does not give rise to any cause of action to the Plaintiff against the Defendant which will result in damages being payable. There are also no averments in the Amended Statement of Claim to support the Plaintiff's claim for damages pursuant to Rule 54 and or O. 64 RHC.

[31] I am in agreement with the above findings of Tuan Stephen Chung JC (as he then was) that there was not any merit in the plaintiff's reliance on r. 54 and O. 64 RHC 1980. As the present action is based on the identical facts in Suit No. K22-27 of 2010, I likewise dismiss the plaintiff's reliance on r. 54 and O. 64 as being without any merit at all.

[32] The Advocates (Practice And Etiquette) Rules 1988 ("the Rules") was gazetted pursuant to GNS 15 of 1988 and had come into effect on 1 September 1988. It must be noted that the Rules itself was drawn up pursuant to s. 17 of the Advocates Ordinance (Sabah Cap. 2) which reads as follows:

> 17. The Chief Judge with the concurrence of the State Attorney General may make rules generally for carrying out the provisions of this Ordinance and in particular for:
>
> (a) regulating the practice and etiquette of the profession in Sabah;
>
> (b) ...
>
> (c) ...
>
> (cc) regulating disciplinary proceedings against any advocate who fails to comply with any rules made under this section;
>
> (ccc) establishing an Inquiry Committee and to make rules for regulating the hearing and investigation of matters before or by an Inquiry Committee; and
>
> (d) ...

[33] It is pertinent to note that the Practice and Etiquette Rules under the Advocates Ordinance (Sabah Cap 2) and those made under the Legal Profession Act 1976 (that is applicable in West Malaysia) are almost identical. Rule 54 in both Sabah and West Malaysia are in *pari-materia*.

[34] In *Asia Commercial Finance (M) Berhad v. Bank Bumiputera Malaysia Berhad & Ors* [1987] 1 LNS 70; [1988] 1 MLJ 33, Zakaria Yatim J in dealing with a breach of r. 56 (identical with the r. 56 under the Sabah provisions) had this to say:

> The Practice and Etiquette Rules, 1978 were made by the Bar Council for the purpose of **"regulating the professional practice, etiquette, conduct and discipline of advocates and solicitors."** See section 77(1) of the Legal Profession Act. Sub-

section (3) of section 77 of the Act states that any advocate and solicitor who fails to comply with the said Rules may be liable for disciplinary proceedings. A

...

In my opinion, the Practice and Etiquette Rules, 1978 only regulate the professional practice, etiquette, conduct and discipline of an advocate and solicitor. The Rules do not regulate the procedure of legal proceedings in the High Court. Indeed, the Bar Council has no power under the Legal Profession Act to make rules to regulate procedure of legal proceedings. B C

The rules regulating and prescribing the procedure and practice to be followed by the High Court are found in the Rules of the High Court 1980. These rules were made by the Rules Committee under powers conferred upon it by section 17 of the Courts of Judicature Act 1964. Order 1 Rule 2(1) of the Rules of the High Court explicitly states that "these rules shall have effect in relation to all proceedings in the High Court ..." D

(emphasis added)

[35] In *Latchman Singh & Sons v. Tan Kian* [1991] 1 CLJ 128; [1991] 3 CLJ (Rep) 121 Wan Yahya J in dealing with a non-compliance of r. 56 of the Legal Profession (Practice and Etiquette) Rules 1978 held: E

For his second ground on irregularity, Counsel took exception to the Legal Aid Bureau's attitude towards obtaining judgment inspite of their awareness of the appellant's notice of appearance. He cited r. 56 of the Legal Profession (Practice and Etiquette) Rule 1978. In reply the Legal Aid Bureau explained they were unaware of the notice of appearance until much later as the appellant had sent the same to the Bureau without any covering letter or reference. **In any event, r. 56 is only a rule of conduct and not a rule of law** and therefore cannot act as an estoppel to prevent one party from obtaining the judgment, even if that party had notice of the appearance filed. (emphasis addded) F G

[36] See also (1) *Sri Minal Construction Sdn Bhd v. Mobil Oil Malaysia Sdn Bhd* [2005] 4 CLJ 767, (2) *BHR Group Ltd (UK) v. Witech Sdn Bhd & Ors* [2004] 3 CLJ 362; [2005] 1 MLJ 280 and (3) *PL Construction Sdn Bhd v. Abdullah Said* [1988] 2 CLJ 808 H

[37] In the light of the above, I find that even if the defendant had breached r. 54, such breach would have rendered the defendant liable to disciplinary proceedings under the inquiry I

committee. Any breach of the Practice and Etiquette Rules and Rule 54 in particular does not tantamount to a breach of the substantive law as the rules are only rules of conduct and not rules of law (see the *dicta* of Wan Yahya J in *Latchman Singh & Ors, supra*).

[38] Order 64 RHC 1980 is merely a procedural provision to regulate the manner of filing the notice of change of solicitors and a breach of this order does not attract any civil liability for its non-compliance.

If The Answer To Question No. 2 Is Yes, Whether The Defendant Is Liable To Pay General Damages And Special Damages In The Sum Of RM506,000 To The Plaintiff Or At All

[39] In the light of my findings in Question No. 2 above, I find that the defendant is not liable pay general damages and special damages in the sum of RM506,000 to the plaintiff or at all.

The Issue Of Whether The Defendant Did Take Over The Conduct Of Suit No. K22-187 Of 2002

[40] The defendant contended that they never took over the conduct of Suit No. 22-187 of 2002 while the plaintiff contended that the defendant took over Suit No. 22-187 of 2002 by virtue of two documents namely the letter dated 18 February 2009 from the defendant to the plaintiff and copied to (1) the Director of Forestry Department and the State Legal Counsel, the State Attorney-General's Chambers, Kota Kinabalu and the second document dated 15 January 2010 from the defendant to the State Attorney General and copied to this Honourable Court, the Forestry Department and the plaintiff.

[41] From the evidence I find that the defendant's letter dated 18 February 2009 was in respect of Suit K21-20 of 2008 (though inadvertently wrongly captioned as K22-20 of 2008) and not Suit K22-187 of 2002. The only reference to Suit K22-187 of 2002 in the said letter was a sentence at para. 5 of the said letter which states:

> 5. **We are also informed by our client that as the Solicitors previously acting for them in Suit No. K22-187 of 2002**, your firm is well aware that our client has ceased using the address as stated in the purported AR Registered receipt dated 17th September 2008 ... (emphasis added)

[42] The plaintiff contended that "the defendant made their intentions very clear without any unequivocal interpretation of what they meant when they referred to the plaintiff "as the solicitors previously acting for them in Suit No. K22-187 of 2002", that is the defendant have taken over the conduct of said Suit No. 22-187 of 2002. A B

[43] I find that the said sentence "We are also informed by our client that as the solicitors previously acting for them in Suit No. K22-187 of 2002", without more, is insufficient for me, to come to a conclusion that the defendant has taken over conduct of the said Suit No. K22-187 of 2002, at that material time. C

[44] Having perused the defendant's said letter dated 18 February 2009, other relevant documents and the testimonies of the plaintiff, DW1 and DW2, I find that the defendant was not purporting to act for Chok Brothers Sdn Bhd in Suit No. K22-187 of 2002 at all material times. D

[45] Furthermore the plaintiff's letter dated 24 February 2009 had made absolutely no mention of the defendant taking over Suit No. K22-187 of 2002. In fact, by seeking the defendant's confirmation as to whether it had instructions to receive all or any legal process "in respect of Civil Suit No. K21-20 of 2008 and any other actions I shall file in due course ...," could only mean that the plaintiff did not believe or was uncertain as to whether that the defendant had taken over the conduct of Suit No. K22-187 of 2002. E F

[46] Neither did the plaintiff put on record any objections that he might have had if he took the stand that the defendant in its letter dated 18 February 2009 had taken over the conduct of the said Suit No. K22-187 of 2002. I find that the necessity for the defendant to take over the conduct of Suit K22-187 of 2002 on behalf of CBSB, only arose sometime on or after 13 April 2009, when the plaintiff had himself purported to serve the unsealed copy of the summons in chambers dated 13 April 2009 in Suit No. K22-187 of 2002 together with the affidavit in support of Marcel Jude a/l MS Joseph on the defendant (refer to pp. 34 - 43 of ABD (A)). Both the summons in chambers dated 13 April 2009 as well the plaintiff's covering letter in this regard were addressed to the defendant as the solicitors for Chok Brothers Sdn Bhd. G H I

A

Counterclaim Of The Defendant

[47] I find that the defendant did not adduce any credible evidence to prove their counterclaim.

B

Order

[48] In the premises, I find that the plaintiff has failed to prove its case on a balance of probability against the defendant and I therefore dismiss the plaintiff's case with costs

C **[49]** As regards the counterclaim of the defendant, I find that the defendant has also failed to prove its case against the plaintiff on a balance of probabilities. In the premises I dismiss the defendant's counterclaim with costs.

D

E

F

G

H

I